

**EPA REGION VIII INTERIM GUIDANCE:
WATER QUALITY STANDARDS FOR
INDIAN TRIBES**

Establishing Clean Water Act § 303
Water Quality Standards Programs
on Indian Reservations

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**** Special Note ****

As of the date of this guidance document, the U.S. Environmental Protection Agency has determined that changes need to be made to simplify the current process by which Indian tribes may qualify to administer various programs under the Clean Water Act, Safe Drinking Water Act, and Clean Air Act. Accordingly, this guidance document will be periodically updated to track current Agency procedures as these program qualification process changes are implemented.

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EPA REGION VIII INTERIM GUIDANCE: WATER QUALITY STANDARDS FOR INDIAN TRIBES

I. INTRODUCTION

The purpose of this guidance is to assist the Indian tribes located in EPA Region VIII to qualify to administer water quality standards programs and to develop water quality standards pursuant to Clean Water Act (CWA) Sections 518 and 303(c). The guidance summarizes key aspects of the recent amendments to the water quality standards regulation pertaining to Indian tribes (see 56 Federal Register 64876, December 12, 1991), as well as Regional positions and priorities relevant to tribal water quality standards programs. This guidance should be considered as a supplement to national water quality standards program regulations and guidance. The primary objectives of this guidance document are to: (1) assist Region VIII tribes with qualifying for the water quality standards program; and (2) explain tribal options for developing an initial set of water quality standards.

A. CWA SECTION 303(c) - WATER QUALITY STANDARDS

Section 303(c) of the Clean Water Act (33 U.S.C. 1313(c)) requires that states and Indian tribes that qualify to administer water quality standards programs develop, review, and revise water quality standards for all surface waters within their jurisdictional boundaries that meet EPA's regulatory definition of "waters of the United States." The Environmental Protection Agency's implementing regulation (40 CFR part 131) requires that such water quality standards include, for example, designated water uses, in-stream criteria sufficient to protect such uses, and an antidegradation policy. EPA's role in the water quality standards program is to set priorities, provide guidance, training, and technical assistance, and to review and approve or disapprove the water quality standards adopted by states and tribes.

The adoption of water quality standards is an iterative process. Because the Clean Water Act requires that water quality standards be reviewed and revised, as necessary, at least once every three years, the adoption of water quality standards is an ongoing process that must periodically respond to the latest scientific information (e.g., on pollutant fate and effects). In many ways the water quality standards program is evolving to meet new challenges. For example, in the case of biological criteria, sediment criteria, and ecological criteria, the development of standards-setting methodologies has only just begun. In this respect the water quality standards program has great potential to play a pivotal role in *improving* the level of protection afforded to all surface waters.

With the passage of Clean Water Act Section 518 in February of 1987 and EPA's subsequent promulgation of implementing revisions to the water quality standards regulation, Indian tribes now have an opportunity to participate in the water quality standards program. However, tribes that qualify to administer water quality standards programs will face the same requirements and responsibilities as states with respect to development, review, and periodic revision of water quality standards for all surface waters on the reservation. Before reaching a decision to pursue a water quality standards program, Indian tribes are encouraged to become fully acquainted with water quality standards program requirements, as described in this guidance and in the various references listed at the end of this document.

B. CWA SECTION 401 - WATER QUALITY CERTIFICATIONS

Section 401 of the Clean Water Act provides that states may grant or deny "certification" for federally permitted or licensed activities that may result in a discharge to the waters of the United States. The decision to grant or deny certification is based on a determination regarding whether the proposed activity will comply with the requirements of certain sections of the Clean Water Act enumerated in Section 401(a)(1). These sections include those requiring water quality standards and permits for point source discharges. If a certification is denied, the federal permitting or licensing agency is prohibited from issuing a permit or license. Certifications are subject to objection from a downstream jurisdiction where the downstream jurisdiction believes that the proposed activity would violate its water quality requirements. Certifications are normally issued by the jurisdiction in which the discharge originates, but may be issued by the EPA.

The revisions to the water quality standards regulation recently published by EPA provide Indian tribes with an opportunity to qualify to administer CWA Section 401 programs. Specifically, Section 131.4(c) of the water quality standards regulation now provides that:

Where EPA determines that a tribe qualifies for treatment as a state¹ for purposes of water quality standards, the tribe likewise qualifies for treatment as a state for purposes of certifications conducted under Clean Water Act Section 401.

Because tribal authority to issue CWA Section 401 certifications will be provided to tribes concurrent with EPA approval of the water quality standards program application, Indian tribes are also encouraged to become fully acquainted with the water quality certification process.

II. PROGRAM APPLICATION REQUIREMENTS

A. IF A TRIBE HAS NOT YET APPLIED TO ADMINISTER A CWA OR SAFE DRINKING WATER ACT (SDWA) PROGRAM

WHAT THE WQS REGULATION SAYS:

- EPA may approve a tribal application to administer a water quality standards program if the application adequately demonstrates that the tribe meets four criteria (see Section 131.8(a) of the water quality standards regulation). In simple terms, the criteria are:
 - 1) the Indian tribe is recognized by the Secretary of the Interior;
 - 2) the Indian tribe has a governing body carrying out substantial governmental duties and powers;

¹ The phrase "treatment as a state," as used in the Clean Water Act, 40 CFR 131, and other EPA programs, referred to treatment of a tribe as eligible for grants and other EPA program activities for which states are eligible. Because the phrase caused some unnecessary confusion, it is used in this guidance only where it is quoted from the existing WQS program regulation found at 40 CFR 131.

- 3) the water quality standards program to be administered by the tribe pertains to management and protection of waters that are located on the reservation and are under the authority of the tribe (the authority criterion); and
 - 4) the tribe is reasonably expected to be capable of carrying out the functions of an effective water quality standards program.
- Applications should be sent to the EPA Regional Administrator and address the four criteria. The specific items that must be included in an application are listed in Table 1 (see also Section 131.8(b) of the water quality standards regulation) and are discussed in the preamble to the final rulemaking amending the water quality standards regulation¹. An example of a tribal application (including a plan to acquire capability) that can be used as a model is included in Appendix 2².
 - Once EPA has received an application, the Agency will review the application for completeness and notify the tribe of receipt and any missing or incomplete items. Once the Agency determines that it has received a complete application, it will, within 30 days, give notice of the application to appropriate governments. Those governments will be given 30 days to comment on the tribe's assertion of authority.
 - Applications will be processed in a timely manner by EPA and tribes will receive prompt written notification of the decision.

WHAT THE PREAMBLE SAYS:

On Authority

- The preamble to the December 12, 1991 EPA rulemaking contains a lengthy analysis of the legal and practical considerations regarding tribal authority, including tribal authority over non-Indian owned fee lands. The Agency's position on tribal authority can be summarized as follows:
 - EPA will resolve authority issues on a case-by-case basis.

¹ Readers may also find useful background information and discussion of the items to be included in a program application in the preamble to the proposed rulemaking, see 54 Federal Register 39098, September 22, 1989.

² The example program application materials included in Appendices 2 and 3 are composite examples that were prepared by EPA Region VIII and based, in part, on previously approved Clean Water Act program applications.

Table 1**Required Items for Tribal WQS Program Applications**

<u>Criterion</u>	<u>Description of Required Items</u>
1. Federal Recognition	<ul style="list-style-type: none">• Statement that tribe is included on DOI list of federally recognized tribes or other appropriate documentation.
2. Substantial Duties and Powers	<ul style="list-style-type: none">• Statement that: (1) describes the form of tribal government, (2) describes the types of governmental functions performed (e. g., power to tax, power of eminent domain, police power), and (3) identifies the source of tribal authority to perform these functions (e.g., tribal constitution).
3. Authority	<ul style="list-style-type: none">• Statement including:<ul style="list-style-type: none">- a map or legal description of the <u>area</u> over which the tribe asserts authority to regulate surface water quality;- a statement by the tribe's legal counsel that describes the basis of the tribe's authority over reservation waters;- copies of documents that support the tribal assertion of authority; and- an identification of the <u>surface waters</u> for which the tribe proposes to establish water quality standards.
4. Capability	<ul style="list-style-type: none">• Statement including:<ul style="list-style-type: none">- a description of previous management experience;- a list of tribal environmental or public health programs (with copies of applicable laws, regulations, or policies);- a description of the entities exercising executive, legislative, and judicial functions of the tribal government¹; and- a description of staff technical and administrative capabilities for managing a water quality standards program or a plan (including sources of funding) to acquire such capabilities.

¹ A Tribe may have addressed this requirement in its showing of "substantial governmental duties and powers" under criterion number 2, above.

- EPA will base determinations regarding tribal authority over any non-Indian fee lands on whether the activities to be regulated under the CWA or affected by water quality standards may have "serious and substantial impacts on the health or welfare of tribal members." This is an interim operating rule to be applied by the Agency and is discussed further in EPA's legal interpretation of Montana v. United States and Brendale v. Yakima Nation found in the preamble to the December 12, 1991 final rule (see 56 Federal Register 64877).
- EPA believes that activities regulated under the CWA or affected by water quality standards generally have "serious and substantial" impacts on human health and welfare.
- EPA anticipates that most tribes will meet EPA's "serious and substantial" operating rule.
- Based on the above, tribal assertions of authority should include the specific items identified in Section 131.8(b)(3) of the water quality standards regulation. The tribal legal counsel should carefully review EPA's legal analysis in the preamble to the December 12, 1991 rulemaking (see 56 Federal Register 64877). Any questions that arise can be discussed with the Indian Law Counsel in the EPA Region VIII Office of Regional Counsel.
- In describing the basis of tribal authority (item 131.8(b)(3)(ii)), tribal applications should include a relatively simple showing that there are waters within the reservation *used* by the tribe or tribal members and that the waters and critical habitat are subject to protection under the CWA (i.e., that the waters meet EPA's regulatory definition of "waters of the United States"). EPA Region VIII recommends that these statements specifically identify and discuss the various tribal uses of reservation surface waters.
- EPA recognizes that some tribes will set reservation water quality standards that apply to non-Indian areas as well as Indian or tribal areas. Because of the mobile nature of pollutants in surface and ground waters and the limited size of waterbodies on reservations, it would be very difficult to separate the effects of water quality impairment on non-Indian fee lands within a reservation from those on Indian and tribal lands. Moreover, because the Clean Water Act's regulatory programs are needed for adequate protection of human health and welfare, EPA believes that most tribes will be able to demonstrate, in their analysis of tribal authority, that setting reservation water quality standards is a matter with serious and substantial impacts on tribal health and welfare.
- Pursuant to the Supreme Court decision in the Potawatomi case, EPA now considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes of Section 518(e)(2), even if they have not been formally designated as "reservations." Thus, tribes may want to assert authority over, and establish water quality standards for, such lands.
- Tribes are strongly encouraged to review the sections of the preamble to the December 12, 1991 rulemaking dealing with the authority requirements prior to preparing their program applications for purposes of water quality standards.

On Capability

- EPA policy is that the Agency's need to ensure adequate tribal capability, as required by CWA Section 518, must be balanced with a broader need to allow tribes to gain experience in CWA programs.
- Based on this policy, tribes may satisfy the capability requirement either by: (1) demonstrating existing capability, or (2) submitting a plan for acquiring such capability. Where a tribe submits a plan to acquire capability, the plan must propose how the tribe will acquire additional administrative and technical expertise, and address how the tribe will obtain the funds to acquire the administrative and technical expertise (see 40 CFR 131.8(b)(4)(iv)).
- Where tribes have already developed draft water quality standards, submission of the standards with the program application will normally be sufficient to ensure satisfaction of the capability requirements, where adequate continuing resources or technical expertise is also evident.

Other Considerations

- Rather than formally deny a tribal request for the water quality standards program, the Agency prefers to work with the tribe to resolve problems with an application so that EPA may approve the application. It is EPA policy to support tribal assumption of CWA programs.
- Before applying for the water quality standards program, tribes should become familiar with and give serious consideration to the resource requirements of assuming responsibility for the program; ultimately, tribes will face the same basic water quality standards program requirements as states. In addition, because tribes will receive authority to issue CWA § 401 certifications when their program application for purposes of water quality standards is approved by EPA Region VIII, tribes should also become familiar with the requirements and responsibilities associated with implementing CWA § 401.
- EPA notes that tribes may receive CWA Section 106 program approval and Section 106 grant funding prior to applying for CWA Section 303 program approval. Likewise, tribes may receive EPA technical assistance and guidance on water quality standards issues prior to submitting their Section 303 program applications. Using such available grant funds and EPA assistance, tribes should be able to develop draft water quality standards for inclusion in their Section 303 program application (i.e., as part of the demonstration of capability). EPA recommends this course of action as a means of:
 - (1) ensuring full tribal understanding of WQS program responsibilities and requirements prior to proceeding with Section 303 program application;
 - (2) building tribal water quality standards capability prior to Section 303 program application; and

- (3) satisfying the WQS program requirement for adoption of tribal standards within three years of the date of Section 303 program approval.

**B. IF A TRIBE HAS PREVIOUSLY APPLIED TO ADMINISTER
A CWA OR SDWA PROGRAM**

WHAT THE WQS REGULATION SAYS:

- The water quality standards regulation at Section 131.8(b)(6) states:

Where a tribe has previously qualified for treatment as a state under a Clean Water Act or Safe Drinking Water Act program, the tribe need only provide the required information which has not been submitted in a previous treatment as a state application.

WHAT THE PREAMBLE SAYS:

- If a tribe has already submitted a program application for a water program, very little new information beyond the request for consideration in the standards program needs to be provided.
- The Agency intends to minimize the impact on tribes that seek various CWA/SDWA programs by having such tribes submit the basic initial application and thereafter submit only such additional information that might be required for each additional program.
- In the case of the water quality standards program, tribes will need to submit to EPA Region VIII a letter requesting program approval for purposes of water quality standards. An example letter that can be used as a model is included in Appendix 3. The items tribes should address in this letter include:
 - 1) the name of the tribal Agency charged with establishing, reviewing, implementing, and revising water quality standards;
 - 2) a description of the tribe's technical expertise to administer and manage the standards program, or a plan describing how the tribe intends to acquire such expertise; and
 - 3) any other information, not previously submitted, that is specified in Section 131.8 of the water quality standards regulation, the preamble to the December 12, 1991 rulemaking, or otherwise needed to clarify the tribe's application.
- Where a tribe submits a plan to acquire capability under item (2) above, it must include a description of the expected funding sources. It may be useful for tribes to discuss such plans with Region VIII program staff prior to submitting the water quality standards program application.
- Where tribes have already developed draft water quality standards, submission of the standards with the application will normally be sufficient to ensure satisfaction of the capability requirements, if adequate continuing resources or technical expertise is also evident.

Other Considerations

- Although in most cases tribes will not need to submit any additional information beyond the items described above, with each program application EPA Region VIII is **required** to re-examine each of the four criteria and provide 30 days to appropriate governmental entities to comment on the tribe's assertion of authority. As a result of this re-examination, EPA may, in certain cases, request that a tribe submit additional information necessary to support a tribal program application. To minimize the impact of the application process on tribes, such requests will be made by EPA only where necessary.
- Prior to requesting program approval for purposes of water quality standards, tribes should consider whether revisions or additions to the previous assertions(s) of authority may be needed. Note that 40 CFR 131.8(b)(3)(i) through (iv) specify several items not previously required in the descriptive statement of tribal authority (e.g., in EPA regulations for the Section 106 grant program). Accordingly, tribes should consider amending any previous demonstrations of authority to include a map or legal description of the area over which the tribe asserts authority to regulate surface water quality, and an identification of the surface waters for which the tribe intends to establish water quality standards (consistent with 40 CFR 131.8(b)(3)(i) and (iv)). In addition, tribes may want to update their assertion of authority to be consistent with EPA's legal analysis of Montana and Brendale found in the preamble to the December 12, 1991 rulemaking. For example, where tribes are asserting authority to regulate the water quality of segments located on non-Indian fee lands, the tribe should consider amending any previous demonstrations of authority to include an assertion that "impairment of such waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the tribe" (see 56 Federal Register 64879, 2nd column, first full paragraph). EPA Region VIII recommends that such assertions identify and discuss the various tribal uses of reservation surface waters (e.g., the example showing of tribal authority included in Appendix 2 of this guidance document).
- Pursuant to the Supreme Court decision in the Potawatomi case, EPA now considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes of Section 518(e)(2), even if they have not been formally designated as "reservations." Thus, tribes may want to assert authority over, and establish water quality standards for, such lands.
- Rather than formally deny a tribal request for the water quality standards program, the Agency prefers to work with the tribe to resolve problems with an application so that EPA may approve the application. It is EPA policy to support tribal assumption of CWA programs.

III. TRIBAL WQS PROGRAMS - GETTING STARTED

A. TRIBAL WQS DEVELOPMENT OPTIONS

- The preamble to the December 12, 1992 rulemaking describes three options for tribal development of water quality standards:
 - Option 1: negotiate a cooperative agreement with an adjacent state to apply the state standards to the reservation;
 - Option 2: adopt the standards of an adjacent state as the tribe's own, with or without modification; or
 - Option 3: independently develop and adopt tribal water quality standards.
- The tribal decision regarding which option to pursue should be based on a number of considerations, including existing water quality problems, existing water quality data, tribal resources and staff, and tribal priorities.
- Options 1 and 2 are probably the quickest and least-costly methods of establishing protective water quality standards for reservation surface waters. Options 1 and 2, because they are based on the existing state standards, are also more likely to result in consistent upstream/downstream standards for waterbodies that flow through the reservation.
- Option 3 allows the tribe more flexibility to develop standards that meet specific tribal needs (e.g., to address site-specific conditions and waterbody uses). Option 3 may require tribes to proceed in a more deliberate manner to establish water quality standards. Option 3 is likely to be the most resource-intensive of the three options (e.g., because the tribe may elect to conduct monitoring studies before designating uses). However, tribes that rely on: (1) existing monitoring data, (2) EPA guidance and criteria recommendations, and (3) appropriate policies and provisions from existing state programs should be able to develop an initial set of standards under option 3 in a timely manner. Efforts to gather new monitoring information, develop site-specific criteria, or to apply highly-refined use designations under option 3 would require more resources and time.
- As explained in Section I of this guidance document, the development of water quality standards is an iterative process. Thus, where Indian tribes elect to establish water quality standards, the option initially selected by the tribe can change in subsequent triennial review periods. Tribal standards may evolve from essentially a codification of existing state standards (options 1 or 2) to a rule entirely of tribal origin (option 3).
- Where option 2 or 3 is pursued, the Region recommends that tribes submit program applications concurrently with their initial draft water quality standards. One factor supporting this recommendation is the fact that, once the program application has been approved by EPA, a three year clock for adoption of an initial set of standards will be activated (discussed further below). Because grant monies are authorized under CWA § 106 rather than the CWA § 303(c) water quality standards program, there is really no advantage to starting the three year clock until the tribe has completed an initial first draft of the water quality standards to be adopted.

Tribes are strongly encouraged to work with EPA Region VIII to develop their water quality standards both before and after the water quality standards program application has been submitted. Working together at the staff level early in the standards development process will help prevent problems later on that may necessitate, for example, EPA disapproval of any significant deficiencies in the adopted tribal water quality standards.

B. REGION VIII GUIDANCE FOR EACH TRIBAL WQS DEVELOPMENT OPTION

- The preamble to the December 12, 1992 rulemaking states that the Agency will expect tribes to establish standards and submit such standards to EPA for review within three years of the date that EPA approves a tribal application to administer a water quality standards program.
- In implementing this EPA policy, Region VIII will use the same basic approach that is now used to establish requirements/priorities for state water quality standards programs. That is, within specific fixed three-year periods, the Region will indicate to each tribe the issues and priorities that tribal water quality standards programs will be expected to address.
- Ultimately, the Region expects that the EPA priorities for tribal water quality standards programs will be substantially consistent with those for state water quality standards programs, and that EPA priorities for both states and tribes will be keyed to the same fixed three year periods (i. e., '91-'93, '94-'96, etc.). However, the priorities for individual tribes and states will always vary somewhat to reflect the needs and issues of the particular tribe or state. Also, the initial schedule for tribal standards programs will depend to some extent on when their program application is approved by EPA.

- The Regional priorities for the FY 1994-1996 triennium for tribes are outlined below. As mentioned previously, the specific requirements applicable to each tribe will vary somewhat to reflect reservation-specific needs. However, the general areas and issues that the Region will focus on are as follows:
 - 1) Has the tribe established appropriate narrative criteria that apply to all reservation waters?
 - 2) Has the tribe established an appropriate antidegradation policy applicable to all reservation waters?
 - 3) Have appropriate uses been designated for all reservation waters, with particular emphasis on use designations for critical segments?
 - 4) Have appropriate numeric criteria been assigned to protect designated uses for all reservation waters, with particular emphasis on criteria for critical segments?
 - 5) Has the tribe established other necessary water quality standards provisions and completed the supporting analyses necessary to satisfy water quality standards program requirements (as described below in Section C)?
 - 6) Has the tribe appropriately addressed any EPA Region VIII recommendations regarding specific issues of concern?

- Tribes should take full advantage of the resources available from EPA Region VIII. The Region has an experienced and helpful water quality standards program staff that is available to answer questions, provide recommendations on difficult issues, and serve as a clearinghouse for EPA guidance materials. Working closely with Region VIII staff on standards issues will ensure that the standards ultimately adopted by the tribe meet tribal needs and fully address CWA requirements.
- Prior to establishing standards, tribes are encouraged to consult with neighboring states, federal agencies (e.g., USGS, USFWS), riverbasin commissions, special interstate or regional organizations, and international organizations that deal with water quality issues (e.g., the Colorado River Basin Salinity Control Forum). Such organizations may be able

to provide monitoring data or other information that will assist the tribe in establishing appropriate standards.

Option 1

- Under option 1, tribes may elect to negotiate a cooperative agreement with an adjacent state to apply state standards to reservation waters. Such agreements can be established by tribes as a temporary approach to setting standards. Such agreements would not affect jurisdiction issues on the reservation. Rather, such agreements would simply extend the state water quality standards program to reservation waters (i.e., during the term of the agreement). Depending upon the specific terms of the agreement, this may be the least costly and quickest option for establishing enforceable designated uses, numeric/narrative criteria, and antidegradation requirements on reservations.
- EPA will expect such cooperative agreements to result in the same level of water quality standards protection for waters on and off the reservation. Under option 1, EPA's priorities and minimum expectations for reservation waters for the FY 1994-1996 triennium would be the same as those for state waters.
- State/tribal cooperative agreements will need to be customized to fit each individual situation. For example, although the states in Region VIII have already classified many reservation surface waters, some reservation waters may have been excluded from these state efforts. In such cases, the cooperative agreement would need to address which waterbodies require state classification actions.
- The Region encourages tribes to pursue such cooperative agreements. EPA will need to be involved in the agreement negotiation process to ensure that CWA Section 518 and 303(c) requirements will be fully satisfied.
- As noted above, the development of tribal standards can be an iterative process. The option initially selected by the tribe can change in subsequent triennial review periods. Tribal standards may evolve from essentially a codification of existing state standards (options 1 or 2) to a rule entirely of tribal origin (option 3).

Option 2 - (EPA Region VIII's Recommended Option)

- Under option 2, tribes may elect to adopt an initial set of water quality standards based on the standards which have been established by an adjacent state. This is the approach recommended by Region VIII for most tribes.
- Tribes should be able to establish enforceable water quality standards more quickly under option 2 than under option 3. In addition, the resulting standards, because they would be based on existing state standards, should achieve a greater degree of upstream/downstream consistency on waterbodies crossing reservation boundaries. However, unlike option 1, the tribe retains the flexibility and control to make fine-tuning adjustments to the state water quality standards (e.g., to modify the designated uses for particular waterbodies of concern).
- Where a tribe pursues option 2, EPA Region VIII is interested and willing to participate in reviewing the existing state water quality standards to identify provisions that can be improved or customized to address tribal needs. Although the state standards in this Region are generally of excellent quality, there is no such thing as a perfect set of standards. Accordingly, tribes pursuing option 2 are advised to evaluate the existing state standards to identify potential areas for improvement.
- To support individual tribes pursuing option 2 the Region will, upon request, provide recommendations regarding possible changes to the existing state standards. In many cases, such recommendations have already been developed by the Region and documented in correspondence from EPA to the state. The Region believes that such EPA recommendations may be a good starting point for tribes interested in modifying the state water quality standards before adopting such standards as their own.
- Although implementation of option 2 will likely result in establishing standards for reservation waters more quickly than under option 3, tribes should recognize that blindly adopting the use designations previously decided upon by the state could create problems later. Consider a case where, after adopting the state standards, a tribe decides to replace an aquatic life use with a sub-category of that use which requires less stringent criteria. In such a case, the tribe would be required to complete a demonstration that the use to be replaced is not "attainable" (i.e., pursuant to the requirements of Section 131.10 of the water quality standards regulation). Such a use attainability analysis could pose an unwanted workload on the tribe that could have been avoided if, prior to the adoption action, the tribe had more carefully evaluated the basis for the state use designations (i.e., because adopting the aquatic life use sub-category to begin with would not have required completion of a use attainability analysis). For this reason the Region encourages option 2 tribes to review the basis for the (state) designated uses which have been assigned to reservation waters (i.e., prior to adopting the state standards).

Option 3

- Under option 3, tribes may elect to independently develop and adopt water quality standards to reflect the particular needs of the tribe. As mentioned above, this option has the potential to be more costly and time-consuming for tribes. However, the level of resources required will depend upon the goals and development methods decided upon by the individual tribe.
- Tribes pursuing option 3 should base their efforts primarily on available EPA national and regional water quality standards program guidance. EPA guidance has been developed on all aspects of the standards program (see list of references at the back of this document). In some program areas, the guidance is quite extensive. In other areas where the national guidance is not as extensive (i.e., standards for recreation, mixing zones, antidegradation), Region VIII has developed, or is currently developing, supplemental guidance to assist states and tribes with developing their water quality standards.
- Although EPA guidance should be the primary focus, tribes pursuing option 3 should not dismiss completely the water quality standards which have been developed by adjacent states. Such standards may contain particular policies, provisions, or approaches that tribes may find useful as examples or models. Tribes are encouraged to review state standards for ideas and methods that may assist with developing appropriate standards. EPA Region VIII can help tribes identify state standards that may be useful or informative.

C. WATER QUALITY STANDARDS PROGRAM REQUIREMENTS

The following discussion provides an overview of the activities that tribes will need to pursue to fully develop their water quality standards programs. The activities that a particular tribe pursues initially will depend upon the development option selected, as well as the goals and budget that the tribe establishes for its water quality standards program. Some of the activities described below are required activities that tribes will be expected to complete pursuant to federal regulatory requirements, while others are optional activities that may be pursued by tribes. With respect to the required activities, EPA Region VIII will establish priorities on a tribe-by-tribe basis to reflect the needs of the individual tribe (e.g., based on the current status of water quality on the reservation). Such priorities will be established after consultations with appropriate tribal contacts as part of each triennial review and revision cycle. The primary focus will be on discussions at the staff level. This priority-setting process is identical to the one EPA Region VIII uses for state water quality standards programs. Due to resource constraints and other factors, EPA Region VIII generally will not expect tribes to satisfy all program requirements during the first triennial review. However, the Region will expect that, over time, all program requirements will be fully satisfied (see Section D - EPA Promulgation of WQS on Reservations). The general objectives that EPA Region VIII has established for the initial triennium (i.e., FY 1994-1996) are described above for each of the three tribal standards development options.

Required Tribal Activities

1. **Adopt narrative criteria applicable to all surface waters.** Tribal standards should include narrative criteria that apply to all waters. These criteria should specify that at all times surface waters shall be free from substances that settle to form objectionable deposits; float as debris, scum, oil, or other matter; produce objectionable color, odor, taste, or turbidity; are acutely toxic, and which produce undesirable or nuisance aquatic life.

Primary References¹: (5) - page 2-10.

2. **Adopt an antidegradation policy.** An antidegradation policy establishes tribal authority to protect existing uses (tier 1), high quality waters (tier 2), and Outstanding National Resource Waters (tier 3). Tribal policies must be at least as stringent as (and may be identical to) federal requirements found in Section 131.12 of the water quality standards regulation. Regional guidance for implementing antidegradation programs is currently under development.

Primary References: (1) - Section 131.12, (5) page 2-13, (6).

3. **Develop a designated use system.** A use "system" means the designated uses that may be assigned by the tribe and, if necessary, a description of each use. Tribes may apply the state use system, a modified state use system, or a use system entirely of tribal design. Tribal uses must include but are not limited to those uses listed in CWA Section 303(c)(2)(A) and water quality standards regulation Section 131.10:

Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

Tribal designated uses in addition to those required may address the unique waterbody uses of each tribe (e.g., ceremonial or religious uses). Please note that this item addresses only the listing and description of designated uses that could be applied to reservation waters; actual assignment of designated uses to each segment is addressed below.

Primary References: (1) - Section 131.10.

4. **Assign designated uses to each segment.** Using the tribal designated use system, tribes will need to determine which uses are appropriate for each segment. One option is to apply the same designated uses to all reservation waters. However, tribes may want to establish and apply subcategories of aquatic life uses to reflect the site-specific aquatic life potential of particular basins or segments. Tribes may also want to vary the application of drinking water uses to reflect whether the individual segment is used or has the potential to be used as a water supply. There may be some segments where the potential

¹ See list beginning on page 27 of this guidance document.

for recreation-induced ingestion is not sufficient to support application of primary contact recreation uses. In general, tribes should designate uses only where such uses are attainable. During the first triennium tribes pursuing options 2 or 3 should, at a minimum, focus on designated uses for critical segments. For example, any segments receiving discharges from point sources are critical segments and should be assigned designated uses as soon as possible to support NPDES permitting.

Primary References: (1) - Section 131.10, (5) - Chapter 3, (9), (10), (39).

5. **Develop numeric criteria for each designated use.** The Region encourages tribes to rely on EPA's criteria guidance for purposes of establishing numerical criteria. However, some decisions regarding application of the EPA criteria guidance will be required to address reservation-specific concerns, particularly with regard to criteria for protection of human health. Among the issues that should be addressed include selection of an incremental cancer risk level and a fish consumption rate. See Chapter Two of the *Technical Support Document for Water Quality Based Toxics Control* for additional discussion and appropriate references.

Primary References: (5) - page 2-22, (13), (14), (15), (16).

6. **Assign numeric criteria to each use/segment.** Tribes will be expected to specify the numeric water quality criteria that are applicable to each segment on the reservation. There are a number of options available to tribes to complete this activity. The approach which is strongly endorsed and supported by Region VIII is to assign a set of criteria to each use and to apply that set of criteria wherever that use is designated. Other options are also available. In general, the water quality standards regulation provides some flexibility with regard to application of numeric criteria. In most cases, restricting application of criteria to individual segments must be based on a determination that there are no current or potential sources of the pollutant or, in the case of human health criteria, that there are no potential human exposure pathways. In general, the Region will encourage tribes to apply numeric criteria broadly in order to establish clear water quality goals and to protect existing high levels of water quality. During the first triennium tribes pursuing options 2 or 3 will be expected, at a minimum, to focus on numeric criteria for critical segments. For example, any segments receiving discharges from point sources are critical segments and should be assigned numeric criteria as soon as possible to support NPDES permitting.

Primary References: (5) - page 2-22, (13), (14), (15), (16).

7. **Adopt a dilution/mixing zone policy and procedure.** If a tribe elects to allow dilution for purposes of point source discharge permitting, a dilution/mixing zone policy and implementation procedure must be adopted pursuant to Section 131.13 of the water quality standards regulation; such policies and procedures are subject to EPA approval. Until such policies are adopted, point source discharge permits must be set to comply with water quality standards at the end-of-pipe. A dilution/mixing zone policy explains the situations in which a mixing zone or an allowance for dilution may be allowed by the permitting authority for purposes of deriving effluent limitations. Such policies should also establish the situations in which a mixing zone or an allowance for dilution may be limited or denied. Where EPA is the permitting authority, the Agency's implementation

of tribal dilution/mixing zone requirements through permits would be subject to tribal certification pursuant to CWA Section 401. Dilution/mixing zone procedures are a required element of the narrative criteria implementation procedure discussed below. One purpose of the dilution/mixing zone procedure is to establish that, where **complete** mixing is a reasonable assumption, NPDES permit requirements will be derived by using certain low or "critical" flows as guidelines in determining appropriate dilution allowances. Such procedures also establish mixing zone size and in-zone quality requirements that apply where mixing of the discharge with the receiving water is **incomplete**¹. Region VIII is developing a Regional policy statement on dilution and mixing zone policies and implementation procedures that is intended to supplement national guidance, promote consistency among and within tribal/state programs in Region VIII, and limit the impacts of mixing zones in surface waters. This document will include specific policies and procedures that tribes can adopt as their own.

Primary References: (5) page 2-7, (16), (37).

8. **Establish procedures for identifying critical conditions.** These procedures establish the methods that are to be followed in identifying critical pH, hardness, temperature, and discharge flows for purposes of establishing TMDLs and deriving water quality based permit limits. These procedures promote consistent implementation of water quality standards through all point source discharge permits. Such procedures are a required element of the narrative criteria implementation procedure discussed below.

Primary References: (16), (37).

9. **Establish antidegradation implementation procedures.** These procedures would include the specific protocols and approaches that are to be used in implementing the tribal antidegradation policy. For example, such procedures would be expected to clearly delineate when a proposed activity would be considered to result in "significant degradation" and thus subject to antidegradation tier 2 review requirements for protection of high quality waters (i.e., based on predicted pollutant loading changes, water quality impacts, or other factors). Regional guidance on this topic is currently under development.

Primary References: (1) - Section 131.12, (5) page 2-13, (6).

10. **Complete Use Attainability Analyses (UAAs) where required.** Section 131.10 of the water quality standards regulation requires that a use attainability analysis (UAA) be completed for waters where fishable/swimmable uses have not been designated, where a fishable/swimmable use is to be removed, or where a subcategory of a fishable/swimmable use that requires less stringent criteria is to be adopted.

Primary References: (1) - Section 131.10, (5) - Chapter 3, (9), (10), (39).

¹ Mixing zones may be allowed in such cases to allow the discharge to mix fully with receiving waters; within the designated mixing zone, certain water quality criteria may be exceeded.

11. **Adopt requirements for assigning/changing designated uses.** Tribal standards will be expected to include provisions specifying the situations in which removing a designated use or adopting a sub-category of a designated use is authorized. Such tribal provisions must be at least as stringent as (and may be identical to) federal requirements found in Section 131.10 of the water quality standards regulation¹.

Primary References: (1) - Section 131.10.

12. **Adopt definitions of key terms.** Tribal standards will be expected to include definitions of key regulatory terms such as, but not limited to, those included in Section 131.3 of the water quality standards regulation.

Primary References: (1) - Section 131.3.

13. **Inventory surface waters and develop a segmentation system.** This may be based on the state segmentation system, the federal Reach File system, or another waterbody segmentation scheme. Descriptions of segment boundaries should be clear and may incorporate references to appropriate permanent landmarks (e.g., confluences, highway crossings, etc.).

Primary References: State water quality standards.

14. **Monitor chemical/physical/biological quality of surface waters.** Such monitoring data may be needed for a variety of purposes including subsequent determination of the appropriate designated uses for each waterbody segment, appropriate biological criteria, and background conditions for purposes of setting permit limits. Tribes pursuing options 2 and 3 are encouraged to take advantage of all existing monitoring data available from state, interstate, and federal agencies and organizations. Although monitoring is not

¹ For example, pursuant to 40 CFR 131.10(g), a designated use which is *not* an existing use may be removed (or replaced by a use subcategory that requires less stringent criteria) where it is demonstrated that attaining the use is not feasible because: (1) naturally occurring pollutant concentrations prevent the attainment of the use; or (2) natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or (3) human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or (4) dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its original condition or to operate such modification in a way that would result in the attainment of the use; or (5) physical conditions related to natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or (6) controls more stringent than those required by Sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.

necessarily a program requirement, monitoring may be needed to adequately complete certain required water quality standards program activities (e.g., biological criteria).

Primary References: (42), (43).

15. **Adopt narrative and/or numeric biological criteria.** Adoption of numeric biological criteria is contingent upon prior completion of the biological monitoring necessary to adequately characterize appropriate reference sites. The Region anticipates that this will be a multi-year effort that may be limited by the resources available to complete the necessary field work. However, the Region and/or the federal water quality standards regulation may ultimately require tribal adoption of numeric biological criteria.

Primary References: (20), (21), (22), (23).

16. **Adopt water quality standards for wetlands.** Tribal water quality standards should clearly establish the water quality requirements for all surface waters, including wetlands. In the short-term, EPA Region VIII is encouraging states and tribes to explicitly include wetlands in the definition of the surface waters to be regulated and to clearly establish that appropriate water quality standards provisions apply to wetlands (e.g., antidegradation, narrative criteria). EPA Region VIII anticipates that tribal water quality standards for wetlands will evolve as knowledge of wetland functions and water quality requirements becomes available.

Primary References: (31), (32), (33), (34).

17. **Establish narrative toxics criteria implementation procedures.** In order to support consistent implementation of tribal narrative "free from" toxics criteria, the Region will eventually expect tribes to describe (in one document) all of the various procedures that are to be followed in implementing such narrative criteria. Such documents should address the various mechanisms used to implement water quality-based controls (i.e., chemical-specific, whole effluent and biological criteria components), as well as how the various mechanisms are to be integrated in protecting designated uses. See pages 31-32 of EPA's *Technical Support Document for Water Quality Based Toxics Control*. Such narrative criteria implementation procedures are required by the water quality standards regulation at 40 CFR 131.11(a)(2). In the short-term, EPA Region VIII will emphasize tribal development of implementation procedures applicable to dilution/mixing zones and critical conditions (these procedures are discussed above as separate activities).

Primary References: (16), (37) - pages 31-32.

Optional Tribal WQS Activities

1. **Designation of ONRWs.** Under tier 3 of antidegradation, tribes may optionally designate specific reservation waters as outstanding national resource waters (ONRWs)¹.

¹ Water quality requirements applicable to ONRWs may include either a "no change in water quality" or a "no new discharges" requirement and address situations where

Such designations may be appropriate for high quality or ecologically unique waters such as those within tribal wilderness areas or wildlife refuges. Although a policy statement authorizing ONRW designations is a federal requirement, the decision regarding which waters to designate ONRW and the specific requirements to apply to such designations is up to the tribe. A key issue for tribes to consider before designating waters as ONRWs is that once designated, the ONRW use may also be viewed as an *existing* use under federal law. The water quality standards regulation prohibits removal of any designated use that is also an existing use. Thus, although this issue has not yet been finally resolved, tribes should give careful consideration before designating ONRWs, as subsequently removing such designations may not be authorized under federal water quality standards requirements. Tribes should also consider that an ONRW designation brings with it fairly rigid and stringent water quality requirements that may restrict or preclude any significant development activities (i.e., both off and on the reservation). ONRW designation is, however, the most effective approach to protecting high quality or ecologically significant tribal water resources, and therefore, bears some consideration in establishing levels of protection for those resources.

Primary References: (1) - Section 131.12, (5) page 2-13, (6).

2. **Adoption of a variance policy.** Variances are temporary exceptions to standards that provide for less stringent water quality requirements; they are time-limited, pollutant-specific, and do not forego the currently designated use. The decision to establish a policy authorizing variances is left to the discretion of the tribe; where adopted, such policies are subject to EPA approval. Based on an adopted variance policy, variances may be issued only where existing uses will be maintained and the variance is justified based on one of the six factors listed in Section 131.10(g) of the water quality standards regulation. For example, variances are often justified based on a determination that installing the treatment technology necessary to achieve the water quality standard would cause substantial and widespread economic and social impact. Individual variances must be included as part of the water quality standards and subject to the same public review as other changes in water quality standards. Thus, unlike mixing zones, the decision to establish a variance is not a permitting decision, but rather a standards-setting decision. It is EPA policy that variances should not be issued for a period lasting longer than three years; upon expiration, the decision to extend a variance is subject to the same procedural requirements as the initial decision to issue the variance. Absent a rulemaking action extending the variance, the underlying water quality standard becomes effective.

Primary References: (1) - Section 131.13, (7).

activities resulting in temporary or short-term changes in water quality may be allowed. A "no change in water quality" requirement differs from a "no new discharge" requirement in that it only mandates that existing levels of water quality be maintained; under this approach, new or expanded discharges may be allowed where compensated by the elimination of other loading sources. Expanded discharges may also be authorized where facility pollutant removal efficiency is improved and total effluent load remains unchanged. Under a "no new discharges" approach, the elimination of a loading source does not create an opportunity for new discharges; improvements in water quality as existing loading sources are eliminated or reduced is thus mandated.

3. **Adoption of site-specific criteria.** Although the Region generally recommends use of EPA's national criteria guidance or the criteria adopted by the adjacent state, there may be specific waters on reservations where development of site-specific criteria is appropriate. Such site-specific criteria may be appropriate where the species used in developing the national criteria are not appropriately representative of the target biological community for the site, or where the chemical characteristics of the laboratory water used in developing the national criteria are substantially different from site water characteristics. In Region VIII, some site-specific criteria have been developed, primarily for ammonia and certain metals. EPA's Water Quality Standards Handbook includes a discussion of several approaches which can be used to develop site-specific criteria.

Primary References: (1) - Section 131.13, (5) - Chapter 4.

4. **Adoption of a schedules of compliance policy.** A schedule of compliance policy allows the permitting authority to establish a date in the permit by which compliance with water quality based effluent limits must be achieved (i.e., a schedule of compliance). The use of schedules of compliance for water quality based limits is typically limited to existing discharges where a new or more stringent water quality standard is adopted. Final compliance is required to be as soon as possible based on reasonable, negotiated estimates of the time required to make the necessary changes to the treatment facility (e.g., construction of additional treatment capability). Such policies may require the facility to evaluate the possibility of achieving the water quality based limits via non-construction changes (e.g., facility operation, pollution prevention). Schedules of compliance policies may place maximum limits on the period of time during which compliance is deferred. Schedules of compliance may not be issued for new discharges. In general, EPA recommends that, where schedules of compliance may be needed in the future, a policy authorizing such schedules should be included in tribal water quality standards. Inclusion of a schedule of compliance in a permit is a permitting decision, but is subject to tribal certification under CWA Section 401. See EPA Region VIII's June 25, 1992 guidance on this topic.

Primary References: (40).

5. **Development of UAA procedures or worksheets.** A use attainability analysis (UAA) is an assessment of physical, chemical, biological, and economic factors that affect attainment of a use. In general, a UAA is used to evaluate whether a particular aquatic life (fishable) or recreation (swimmable) designated use is attainable. Section 131.10 of the WQS regulation requires that a UAA be completed in three situations:
- i) where fishable/swimmable uses have not been designated;
 - ii) where a fishable/swimmable use is to be removed; or
 - iii) where a subcategory of a fishable/swimmable use that requires less stringent criteria is to be adopted.

Although guidance on the conduct of UAAs is available from EPA, tribes may optionally develop specific procedures, checklists, or worksheets that will be used in conducting UAAs on the reservation. Such procedures should be developed in consultation with EPA.

Primary References: (1) - Section 131.10, (5) - Chapter 3, (9), (10), (39).

D. EPA PROMULGATION OF FEDERAL WQS ON RESERVATIONS

- As discussed above, it is EPA policy to support tribal adoption of reservation water quality standards. There are three standards development options that tribes may pursue; the resources necessary to implement the three options depends to a large degree on tribal needs and priorities. Region VIII is committed to provide tribes with an extended opportunity to develop their own water quality standards following one of these three options.
- Ultimately, EPA promulgation of federal water quality standards on reservations may be necessary in order to ensure that enforceable water quality standards are in place to protect all reservation surface waters. However, such promulgation actions are likely to be pursued only as a course of last resort, in consultation with the affected tribe, and after the tribe has had ample opportunity to establish tribal water quality standards. For reservations where tribal water quality standards are adopted, EPA promulgation of federal standards will be pursued only where clearly necessary to meet the requirements of the CWA (i.e., to resolve a significant issue that has resulted in an EPA disapproval action).

References

Copies of the following references are available to the Indian tribes located in EPA Region VIII from the contacts listed in Appendix 1 of this document. "Primary" references from the previous section are denoted with an "♦."

- ♦ 1. Water Quality Standards Regulation. 40 CFR Part 131. 48 FR 51400, November 8, 1983.
2. Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations; Proposed Rule. 54 FR 39098, September 22, 1989.
3. Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations; Final Rule. 56 FR 64876, December 12, 1991.
4. Introduction to Water Quality Standards. U.S. Environmental Protection Agency, September, 1988.
- ♦ 5. Water Quality Standards Handbook. U.S. Environmental Protection Agency, 1983.
- ♦ 6. Questions and Answers on Antidegradation. U.S. Environmental Protection Agency, August, 1985.
- ♦ 7. "Variances from Water Quality Standards." U.S. Environmental Protection Agency, memorandum signed by Edwin L. Johnson, March, 1985.
8. Nonpoint Source Controls and Water Quality Standards. U.S. Environmental Protection Agency, August, 1987.
- ♦ 9. Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analyses. U.S. Environmental Protection Agency, 1983.
- ♦ 10. Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use Attainability Analyses, Volume III - Lake Systems. U.S. Environmental Protection Agency, 1984.
11. Guidelines for Deriving National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses. U.S. Environmental Protection Agency, 45 FR 79318, November 28, 1980, as amended at 50 FR 330784, July 29, 1985.
12. Guidelines and Methodology Used in the Preparation of Health Effect Assessment Chapters of the Consent Decree Water Criteria Documents. U.S. Environmental Protection Agency, 45 FR 79318, November 28, 1980.
- ♦ 13. Water Quality Criteria Documents Issued by EPA Pursuant to CWA Section 304(a).
- ♦ 14. Quality Criteria for Water, 1986 (the Gold Book). U.S. Environmental Protection Agency, 1986.

- ♦ 15. Guidance for State Implementation of Water Quality Standards for CWA Section 303(c)(2)(B). U.S. Environmental Protection Agency, December, 1988.
- ♦ 16. Compliance with the Toxics Requirements of Section 303(c)(2)(B) of the Clean Water Act and the Water Quality Standards Regulation (40 CFR 131.11). U.S. Environmental Protection Agency Region VIII memorandum, Water Management Division, January 17, 1990.
- 17. Status Report: State Compliance with Clean Water Act Section 303(c)(2)(B) as of February 4, 1990. U.S. Environmental Protection Agency, April, 1990.
- 18. Amendments to the Water Quality Standards Regulation; Compliance with Section 303(c)(2)(B); Proposed Rule. 56 FR 58420, November 19, 1991.
- 19. Briefing Report to the EPA Science Advisory Board on the Equilibrium Partitioning Approach to Generating Sediment Quality Criteria. U.S. Environmental Protection Agency, April, 1989.
- ♦ 20. Biological Criteria, National Program Guidance for Surface Waters. U.S. Environmental Protection Agency, April, 1990.
- ♦ 21. Rapid Bioassessment Protocols for Use in Streams and Rivers. Benthic Macroinvertebrates and Fish. May, 1989.
- ♦ 22. Policy on the Use of Biological Assessments and Criteria in the Water Quality Program. U.S. Environmental Protection Agency, May, 1991.
- ♦ 23. Ohio EPA's Use of Biological Survey Information; Water Quality Program Highlights. U.S. Environmental Protection Agency, May, 1990.
- 24. Ecoregions: An Approach to Surface Water Protection. Robert M. Hughes and David P. Larsen. Journal, Water Pollution Control Federation. April, 1988.
- 25. Consumption Surveys for Fish and Shellfish. A Review and Analysis of Survey Methods. U.S. Environmental Protection Agency, February, 1992.
- 26. Assessing Human Health Risks from Chemically Contaminated Fish and Shellfish: A Guidance Manual. U.S. Environmental Protection Agency, September, 1989.
- 27. Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms, Fourth Edition. U.S. Environmental Protection Agency, September, 1991.
- 28. Biological Criteria: State Development and Implementation Efforts. U.S. Environmental Protection Agency, July, 1991.
- 29. Biological Criteria: Guide to Technical Literature. U.S. Environmental Protection Agency, July, 1991.

30. Biological Criteria: Research and Regulation. U.S. Environmental Protection Agency, July, 1991.
- ♦ 31. Water Quality Standards for Wetlands: National Guidance. U.S. Environmental Protection Agency, 1990.
- ♦ 32. "Numeric Water Quality Criteria for Wetlands." U.S. Environmental Protection Agency memorandum signed by William R. Diamond, Director, Criteria and Standards Division, July 19, 1991.
- ♦ 33. Water Quality Standards for Wetlands in Washington State. Jaime C. Kooser, Washington Department of Ecology.
- ♦ 34. Wetlands and 401 Certification: Opportunities and Guidelines for States and Indian Tribes. U.S. Environmental Protection Agency, April, 1989.
35. Water Quality Standards Criteria Summaries: A Compilation of State/Federal Criteria (by pollutant). U.S. Environmental Protection Agency, 1988.
36. State Water Quality Standards Summaries (by State). U.S. Environmental Protection Agency, 1988.
- ♦ 37. Technical Support Document for Water Quality Based Toxics Control. U.S. Environmental Protection Agency, March, 1991.
38. Permit Writers Guide to Water Quality Based Toxics Control. U.S. Environmental Protection Agency, July, 1987.
- ♦ 39. EPA Region VIII WQS Guidance: Recreation Standards and the CWA Section 101(a)(2) "Swimmable" Goal. May, 1992.
- ♦ 40. The Recent Decision by EPA's Environmental Appeals Board Regarding Star-Kist Caribe, Inc. U.S. Environmental Protection Agency Region VIII memorandum, Water Management Division, June 26, 1992.
41. Guidance for Water Quality-Based Decisions: The TMDL Process. U.S. Environmental Protection Agency, April, 1991.
- ♦ 42. Guidance for State Water Monitoring and Wasteload Allocation Programs. U.S. Environmental Protection Agency, 1985.
- ♦ 43. Monitoring Guidelines to Evaluate Effects of Forestry Activities on Streams in the Pacific Northwest and Alaska. U.S. Environmental Protection Agency, Region 10, Seattle, Washington, 1991.
44. Reference Guide to Water Quality Standards for Indian Tribes. U.S. Environmental Protection Agency. January, 1990.

APPENDIX 1

List of EPA Region VIII Contacts (as of January, 1993)

Water Management Division

Tribal Water Program Coordinator	Chris Lehnertz	(303) 293-1656
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WQS Program Contacts	Jim Luey	(303) 293-1425
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	Bill Wuerthele	(303) 293-1586
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	David Moon (CO, UT, ND)	(303) 293-1561
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	Bob Erickson (MT, SD, WY)	(303) 293-1566
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TMDL Program Coordinator	Bruce Zander	(303) 293-1580
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Monitoring Program Coordinator	Phil Johnson	(303) 293-1581
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Office of Regional Counsel

Tribal Jurisdiction Issues	Leigh Price	(303) 294-7548
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Office of External Affairs

EPA Region VIII Tribal Liaison	Caren Rothstein	(303) 294-1114
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APPENDIX 2

Example Tribal Program Application Where the Tribe has not yet Applied to Administer a CWA or SDWA Program

EXAMPLE REQUEST LETTER

January 1, 1993

Mr. Jack W. McGraw
Acting Regional Administrator
US Environmental Protection Agency
Region VIII
999 18th Street, Suite 500
Denver, Colorado 80202-2466

Dear Mr. McGraw:

The _____ tribe hereby requests program approval from the United States Environmental Protection Agency for purposes of the section 303(c) water quality standards and section 401 certification programs. The tribe is seeking approval with regard to functions to be carried out under sections 303(c) and 401 of the Clean Water Act, pertaining to the management and protection of all water resources held by the tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the _____ Reservation.

The water quality standards regulation at 40 CFR 131.8(a) identifies four criteria that must be satisfied before the EPA Regional Administrator can approve a tribal program application. With regard to the federal recognition criterion, the _____ tribe is included on the Secretary of the Interior's published list of federally recognized tribes (see 53 Federal Register 52829, December 29, 1988).

EXAMPLE REQUEST LETTER
(continued)

Information in support of this request is enclosed to address the remaining three criteria as required by 40 CFR 131.(8)(b)(2)-(4). Included are:

- Enclosure (1): Statement of Tribal Governmental Duties and Powers
- Enclosure (2): Statement of Tribal Authority to Regulate Water Quality
- Enclosure (3): Statement of Tribal Capability

If you have any questions regarding the enclosed information or this request, please contact _____ of my staff at (____) ____ - ____.

Sincerely,

Tribal Chairman

Enclosures (3)

EXAMPLE ENCLOSURE (1)--

STATEMENT OF TRIBAL GOVERNMENTAL DUTIES AND POWERS

The _____ tribe is a constitutional government and was organized according to the authority of section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984).

I. Governmental Duties:

- a. **Form of Government:** The _____ tribal government is a tri-partite system of government. The Executive Office consists of the Tribal Chairman and the Executive Committee. The legislative branch is comprised of twelve representatives on the Tribal Council. The judicial branch consists of Criminal Court, Civil Court, Juvenile Court and the Court of Appeals.
- b. **Governmental Functions:** The tribal government performs essential government functions on the Reservation.
 - 1. The tribe established and maintains law and order on the Reservation through the Tribal Police Department, the Tribal Prosecutor's Office, the Tribal Public Defender's Office and the Tribal Court System.
 - 2. The tribe established and maintains a sanitary landfill and a solid waste collection system servicing all residents of the Reservation.
 - 3. The tribe established and maintains a social services department, providing a variety of health, safety, and welfare related programs.
- c. **Source of Authority:** The Constitution and By-Laws (attached) of the _____ tribe were adopted by the people of the Tribe on (date) . The Constitution is supplemented by laws, ordinances and resolutions that have been enacted by the Tribal Council. These laws and ordinances are set forth in the Tribal Code (attached).

EXAMPLE ENCLOSURE (2)--

STATEMENT OF TRIBAL AUTHORITY TO REGULATE WATER QUALITY

I. MAP AND/OR LEGAL DESCRIPTION:

A map and/or legal description of the reservation are attached. The tribe intends to set water quality standards for all surface waters within the exterior boundaries of the reservation. The reservation consists of _____ acres, with _____ acres held in trust for the Tribe or individual allottees by the U.S. Government and _____ acres owned in fee simple by non-members.

II. BASIS OF AUTHORITY:

The Tribal Constitution sets forth the territorial limits of the Tribe. Article I states that "...". The reservation boundaries were established when the Tribe entered into the following treaties with the United States Government: [Insert appropriate citations]. Section ____ of the [Tribal Water Quality Management Code] specifically authorizes the [Tribal Department of Environmental Quality] to set and enforce water quality standards and otherwise manage reservation water quality. Tribal Courts have authority under Section ____ of the [Tribal Judicial Code] to enforce tribal standards and regulations against all pollution sources within the exterior boundaries of the reservation. Copies of the relevant portions of the Constitution and Codes are attached.

The authority of the Tribe to set water quality standards applicable to the entire reservation derives from the Tribal Government's police power to protect the health and safety of all persons within the exterior boundaries of the reservation. This police power is part of the Tribal Government's inherent sovereign power that has existed since time immemorial. The sovereign power of the Tribe is recognized in the Commerce Clause to the U.S. Constitution and in well-established principles of Federal Indian Law as set forth in opinions of the U.S. Supreme Court. See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); Williams v. Lee, 358 U.S. 217 (1959), McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); United States v. Wheeler, 435 U.S. 313, 327 (1978); Montana v. United States, 450 U.S. 544, 564-66 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 n.16 (1983); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989).

EXAMPLE ENCLOSURE (2)-- (continued)

In regard to specific tribal authority to set water quality standards for waters contained within, or flowing through, non-Indian owned fee lands located within the Reservation, the Tribe has such authority as an inherent aspect of its retained civil jurisdiction over non-Indian and non-member Indian conduct on reservation fee lands. The U.S. Supreme Court has established that tribes retain such authority where the behavior to be regulated "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the Tribe." Montana v. United States, 450 U.S. 544, 565-6 (1981). The Tribe agrees with EPA that the Supreme Court's decision in Brendale, is "fully consistent with Montana" in this regard. 56 Fed. Reg. 64,877 (1991).

Tribal members use the reservation surface waters for which the Tribe may set water quality standards (See Section IV., below) for a variety of purposes, including fishing, swimming, stock watering, religious ceremonies, and public water supply. In addition, surface water quality affects the water quality of reservation groundwater that is the source of drinking water for individual wells of tribal members. [NOTE: THIS IS AN EXAMPLE. THE TRIBE SHOULD GIVE FACTS APPROPRIATE TO ITS PARTICULAR RESERVATION HERE.] Thus, tribal members could be exposed to pollutants present in, or introduced into, those waters as a result of improper management of water quality or regulation of water pollution sources. For this reason, and the fact that the mobile nature of pollutants in surface and ground waters makes it practically very difficult to separate out the effects of water quality impairment on non-Indian fee land from those on tribal portions, the Tribe finds that establishment of tribal water quality standards for reservation waters, including waters on non-Indian fee lands, is necessary to proper management of reservation water quality and protection of tribal health and welfare.

In addition, the Tribe finds that the potential impact on tribal members of improperly regulated water quality is so significant that it meets not only the Montana test but also the "interim operating rule" adopted by EPA, requiring tribes to show "that the potential impacts of regulated activities on the tribe are serious and substantial." 56 Fed. Reg. 64,878 (1991). Reservation waters and critical habitat are subject to protection under the Clean Water Act, in part because improperly regulated water pollution can have serious and substantial impacts on human health and welfare. EPA states that the activities regulated under the various EPA statutes "generally have serious and substantial impacts on human health and welfare." Similarly, the potential impact on the health and welfare of tribal members from improperly regulated sources of pollution is

EXAMPLE ENCLOSURE (2)-- (continued)

so serious and substantial that appropriate water quality management and regulation by the Tribal Government and/or EPA is necessary under tribal law and the Clean Water Act.

[NOTE: IF THE TRIBE KNOWS OF OR SUSPECTS PARTICULAR WATER POLLUTION PROBLEMS, THESE MAY BE DISCUSSED HERE. FOR EXAMPLE, PARTICULAR STREAMS MAY HAVE SPECIFIC POLLUTION PROBLEMS FROM A WASTEWATER TREATMENT PLANT OR OTHER SOURCES; A PULP MILL MAY BE RELEASING DIOXINS INTO RESERVATION STREAMS; SIGNIFICANT PESTICIDE RUNOFF MAY BE SUSPECTED FROM FARMLANDS; ANY KNOWN FACTS ABOUT RESERVATION STREAM QUALITY OR SOURCES OF POLLUTION WILL BE HELPFUL.]

Thus, the Tribe finds that impairment of reservation water quality by non-Indians, including waters found on non-Indian owned fee lands, would have a serious and substantial effect on the health and welfare of the Tribe.

In addition to the above analysis, requested by EPA at 56 Fed. Reg. 64,881 (1991), the Tribe believes that the U.S. Congress, in enacting Section 518 to the Clean Water Act, implicitly delegated to tribal governments all civil regulatory authority necessary and appropriate to carry out and enforce effective water quality management programs under Section 518. To find otherwise might create the possibility that tribally-managed programs could have fewer or less effective regulatory tools than other government-managed programs; the Tribe does not believe that Congress could have intended such a result. In addition, the Tribe agrees with EPA that a "checkerboard" system of regulation is not effective or feasible and that "Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA." 56 Fed. Reg. 64,878 (1991). Congressional delegation would be the most rational and effective means to achieve both results, and we believe that this was Congress' intent in fact. Lastly, Justice White, in Brendale, explained that there could be

"no contention...that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. Compare 18 U.S.C. 1151, 1161 (1982 ed., and Supp. V); 33 U.S.C. 1377 (e) and (h)(1)(1982 ed., Supp. V). [i.e., Sections 518(e) and 518(h)(1) of the Clean Water Act].

***EXAMPLE ENCLOSURE (2)--
(continued)***

In sum, the Tribe believes that it possesses the requisite authority to set water quality standards for all reservation surface waters designated in Section IV, below.

III. DOCUMENTS:

Copies of relevant documents that support the Tribe's assertion of authority are attached.

[NOTE: COPIES OF ANY RELEVANT DOCUMENTS TO SUPPORT THE TRIBE'S ASSERTION OF AUTHORITY SHOULD BE LISTED HERE AND ATTACHED. SEE 40 C.F.R. 131.8(b)(3)(iii).]

IV. SURFACE WATERS TO BE ADDRESSED BY STANDARDS:

A listing of the surface waters for which the Tribe may set water quality standards is attached. These waters are also delineated on the attached reservation map. The Tribe proposes to set standards for all surface waters on the reservation that meet EPA's regulatory definition of "waters of the United States."

EXAMPLE ENCLOSURE (3)--

STATEMENT OF TRIBAL CAPABILITY

The _____ tribe is capable of administering an effective water quality standards program based on the following information:

I. Previous Management Experience:

The _____ tribe has the capability to administer an effective water quality standards program, as demonstrated by its existing administrative experience. The tribe currently employs (#) people in tribal government, and the tribe manages a wide range of programs, including those authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act, or the Indian Sanitation Facility Construction Activity Act. Such programs include the _____ tribe Water and Mineral Authority, the Indian Child Welfare Program, and the Women's and Children's Program.

II. Environmental /Public Health Programs:

Two tribal committees currently oversee environmental and public health concerns, the Health, Welfare and Environment Committee and the Water, Land, and Natural Resources Committee. Many programs are administered under the oversight of these committees, including:

Tribal Health Program- provides health care at tribal clinics, including education programs, alcohol prevention programs, and AIDS awareness.

Natural Resources Department- enforces game and fish codes, protects tribal natural resources, and assists in evaluating tribal land uses.

Water Quality Program - coordinates tribal water quality activities, including implementation of the EPA Section 106 and 314 grants.

Applicable tribal laws, policies and regulations are attached.

EXAMPLE ENCLOSURE (3)-- (continued)

III. Executive, Legislative, and Judicial:

The Chief Executive Officer for the tribe is the Tribal Chairman, who works closely with the Executive Committee. Tribal Legislation is passed by the Tribal Council, which is comprised of 12 members representing 6 tribal districts. The tribal judicial system includes Criminal Court, Civil Court, Juvenile Court, and the Court of Appeals. Copies of the Constitution and By-Laws are attached.

IV. Administering Agency:

The Water Quality Program will be responsible for establishing, reviewing, implementing, and revising tribal water quality standards. The Water Quality Program will work closely with its oversight committee, the Water, Land and Natural Resources Committee. Final approval of water quality standards will be the responsibility of the Tribal Council.

An organizational chart is attached, including a description of the interaction between the Program, Committee, and Council.

V. Technical and Administrative Capabilities:

In addition to the management experience described in section I, the tribe will be submitting an application to EPA Region VIII to receive grant funding under Clean Water Act § 106. When this grant funding is received, the tribe will use the funds to employ a Water Quality Analyst whose responsibilities will include development and periodic review of tribal water quality standards pursuant to CWA § 303(c) requirements.

APPENDIX 3

Example Tribal Program Application Materials Where the Tribe has Previously Applied to Administer a CWA or SDWA Program

EXAMPLE REQUEST LETTER

January 1, 1993

Mr. Jack W. McGraw
Acting Regional Administrator
U.S. Environmental Protection Agency
Region VIII
999 18th Street, Suite 500
Denver, Colorado 80202

Dear Mr. McGraw:

The _____ tribe requests program approval from the Environmental Protection Agency for purposes of the Clean Water Act section 303(c) water quality standards and section 401 certification programs. The _____ tribe was previously approved by the EPA to administer the _____ (CWA or SDWA program) _____. Please rely on the documents previously submitted to support our request for the _____ (CWA or SDWA program) _____ as well as the documents submitted herewith, as the basis for this consideration.

The tribe is seeking program approval with regard to functions to be carried out under sections 303(c) and 401 of the Clean Water Act, pertaining to the management and protection of all water resources held by the tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of the _____ Reservation.

EXAMPLE REQUEST LETTER ***(continued)***

Enclosed are three documents that provide additional information that is appropriate to our application. Included are:

- Enclosure 1) Statement of the basis of tribal authority (NOTE: NO EXAMPLE IS INCLUDED - SEE EXAMPLE SHOWING OF AUTHORITY IN APPENDIX 2).
- Enclosure 2) Map of the Reservation and an identification of the surface waters for which water quality standards will be adopted (NOTE: NO EXAMPLE IS INCLUDED).
- Enclosure 3) Narrative statement describing tribal capability.

Please contact me directly when EPA has made its decision. If you have questions regarding these application materials please contact _____ of my staff.

Sincerely,

Tribal Chairman

Enclosures (3)

EXAMPLE ENCLOSURE (3)--

DESCRIPTION OF TRIBAL CAPABILITY¹

The _____ tribe is capable of administering an effective water quality standards program based on the following information:

I. Previous Management Experience:

The _____ tribe has the capability to administer an effective water quality standards program, as demonstrated by its existing administrative experience. The tribe currently employs (#) people in tribal government, and the tribe manages a wide range of programs, including those authorized by the Indian Self-Determination and Education Assistance Act, the Indian Mineral Development Act, or the Indian Sanitation Facility Construction Activity Act. Such programs include the _____ tribe Water and Mineral Authority, the Indian Child Welfare Program, and the Women's and Children's Program.

II. Environmental /Public Health Programs:

Two tribal committees currently oversee environmental and public health concerns, the Health, Welfare and Environment Committee and the Water, Land, and Natural Resources Committee. Many programs are administered under the oversight of these committees, including:

Tribal Health Program - provides health care at tribal clinics, including education programs, alcohol prevention programs, and AIDS awareness.

Natural Resources - enforces game and fish codes, protects tribal natural resources, and assists in evaluating tribal land uses.

Water Quality Program - coordinates tribal water quality activities, including implementation of the EPA Section 106 and 314 grants.

Pertinent tribal laws, policies and regulations (i.e., those not submitted with our previous CWA or SDWA program application(s)) are attached.

¹ This example is included because of the requirement found at § 131.8(b)(4) of the water quality standards regulation, which requires tribal application materials to include a narrative statement describing the capability of the Tribe to administer an effective water quality standards program. Because the administration of a standards program will vary from the administration of another CWA or SDWA program, this documentation must be included as an appropriate supplement to any previous tribal CWA or SDWA program applications.

EXAMPLE ENCLOSURE (3)-- (continued)

III. Executive, Legislative, and Judicial:

The Chief Executive Officer for the tribe is the Tribal Chairman, who works closely with the Executive Committee. Tribal Legislation is passed by the Tribal Council, which is comprised of 12 members representing 6 tribal districts. The tribal judicial system includes Criminal Court, Civil Court, Juvenile Court, and the Court of Appeals. The Constitution and By-Laws were included with a previous CWA or SDWA program application.

IV. Administering Agency:

The Water Quality Program will be responsible for establishing, reviewing, implementing, and revising tribal water quality standards. The Water Quality Program will work closely with its oversight committee, the Water, Land and Natural Resources Committee. Final approval of water quality standards will be the responsibility of the Tribal Council.

An updated organizational chart is attached, including a description of the interaction between the Program, Committee, and Council.

V. Technical and Administrative Capabilities:

In addition to the management experience described in section I, the tribe has shown technical and administrative capability via the Water Quality Program. The current program staff include a Water Quality Analyst, a Program Administrator, and a Secretary. Resumes for each are attached. The Water Quality Program is partially funded through the EPA section 106 and 314 programs, and has been for three years. Tribal performance on this grant has been acceptable to EPA and demonstrates tribal capability to administer a water quality standards program. The development of draft tribal standards was performed under the section 106 grant (copy attached).